FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 21 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 608

ROGER BAUMAN, TRUSTEE FOR THE JON ROGER BAUMAN TRUST ESTATE AND THE MICHAEL COLLINS BAUMAN TRUST ESTATE,
Petitioner,

vs.

CHOCTAW-CHICKASAW NATIONS, HEIRS OF W. F ROWSEY; AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WALTER J. ARNOTE,
301 Arnote Building,
McAlester, Oklahoma,
JAMES B. BRATTON,
301 Arnote Building,
McAlester, Oklahoma,
Counsel for Petitioner.

E. L. MERTENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3080

INDEX

Opinions Below 2
Jurisdiction 2
Question Presented 2
Statutes Involved 2
Statement 2
Reasons for Granting the Writ 5
Conclusion 8
Appendix A—Statutes A1
B—Opinion below A6

CITATIONS

Cases:

Hardin v. *Jordon*, 140 U.S. 371 5
State v. *Warden*, 200 Okla. 613, 198 P.2d 402 6
United States v. *Hayes*, 20 F.2d 873, certiorari denied 275 U.S. 552 and 555 6

Statutes:

Act of June 27, 1898, 30 Stat. 493 ..... 3, 6, 7
Act of July 1, 1902, 32 Stat. 641 4
Act of April 26, 1906, 34 Stat. 137 ..... 4, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. .....

ROGER BAUMAN, TRUSTEE FOR THE JON ROGER BAUMAN TRUST ESTATE AND THE MICHAEL COLLINS BAUMAN TRUST ESTATE,
Petitioner,

vs.

CHOCTAW-CHICKASAW NATIONS, HEIRS OF W. E. ROWSEY; AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled cause on June 30, 1964.

CITATIONS TO OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the District Court (R. 20-23) is unreported. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, A6-A13, is reported in 333 F.2d 785.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1964 (Tr. 4). Rehearing was denied on July 27, 1964 (Tr. 6). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the Choctaw-Chickasaw Nations retained any interest in a non-navigable river bed or in an area condemned for railroad purposes when all lands bordering thereon were conveyed to third parties by deeds issued by the Choctaw-Chickasaw Nations, without any reservation.

STATUTES INVOLVED

The statutory provisions involved are: Act of June 27, 1898, 30 Stat. 493; Sections 14 and 26 (b), Act of July 1, 1902, 32 Stat. 641 and Section 14, Act of April 26, 1906, 34 Stat. 137. They are printed in Appendix A, *infra*, pp. A1-A5

STATEMENT

The United States of America brought a condemnation action against 941.76 acres of land together with all accre-

tions and erosions thereto for the Eufaula Dam and Reservoir on the Canadian River in Oklahoma in the United States District Court for the Eastern District of Oklahoma, on January 20, 1960 (R. 1-10). Claim was made to ownership of land lying North of the area described therein by reason of accretion (R. 28). An amendment to the complaint naming additional parties defendant was filed on May 28, 1962 (R. 9-12).

On September 14, 1962, the United States of America filed a condemnation action in the United States District Court against 256.76 acres of land for the same purposes (R. 12-16). The land involved in this action was adjacent to the land described in the first mentioned action. The two cases were consolidated for trial to determine ownership of all the land and trial was held on December 2, 1962 (R. 20).

The real property condemned in these two cases was originally part of the Choctaw-Chickasaw tribal domain. The tract involved in this controversy was, at the time of allotments of the land by the Choctaw-Chickasaw Nations, within the bed of the South Canadian River, a non-navigable stream, or was in an area condemned by the Missouri-Kansas & Texas Railroad Company pursuant to the Act of June 27, 1898, 30 Stat. 493. The area condemned lay wholly within the bed of the stream except a narrow strip on the Northwest corner and a narrow strip on the Southeast corner (Exhibit 3—Choctaw-Chickasaw on file in the Court of Appeals). The Choctaw-Chickasaw Nations conveyed, without reservation, all of the land bordering on both sides of this tract by various deeds and patents (R. 16, 30, 33, 74, 77-81). The successors in interest of the land so conveyed were parties at the combined trial of this case (R. 28).

At the time the condemnation actions were filed, the river had moved northward and the land had been used for farming purposes for many years (R. 45, 48, 50, 57).

The Act of July 1, 1902, 32 Stat. 641, directed that the Choctaw-Chickasaw Nations dispose of all lands except certain lands reserved from allotment. This act reserved all lands in which any railroad had a vested right for rights of way, depots, station grounds, water stations, stock yards, or similar uses connected with the maintenance or operation of the railroad.

The Congress of the United States by Section 14 of the Act of April 26, 1906, 34 Stat. 137, directed that lands reserved from allotment for railroad purposes would revert to the adjoining land owner when the railroad ceased to use the land for the purpose it was acquired.

By stipulations and agreements at the trial, all issues of ownership were resolved in favor of petitioner except the claim of the Choctaw-Chickasaw Nations (R. 19, 20, 29, 30).

Petitioner contended that the conveyances by the Choctaw-Chickasaw Nations of all the lands bordering on both banks of the river and the area condemned by the railroad, without reservation, passed all the title that the Nations had in the tract. The Nations contended that the tract was unallotted lands.

The trial court found that the area condemned by the Missouri-Kansas & Texas Railroad was an easement; that the easement had been abandoned, and upon abandonment, no part thereof reverted to the petitioner. The trial court held that the Choctaw-Chickasaw Nations were the owners of the entire tract, except 20 acres which was owned by the heirs of W. E. Rowsey (R. 20-23).

The court of appeals found that the Missouri-Kansas & Texas Railroad did not get any title whatever, even an easement, in the area condemned, and held that the entire tract was unallotted tribal lands of the Choctaw-Chickasaw Nations, except 20 acres which was owned by petitioner.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts in principle with the decisions of this court on important issues affecting title to real property. The stability of land titles on all lands bordering on streams and non-navigable rivers in all that part of Oklahoma which was formerly Indian Territory is adversely affected. The stability of land titles on all other lands bordering on streams and non-navigable rivers is also adversely affected. In this case, separate deeds were issued, without reservation, by the Choctaw-Chickasaw Nations to the same grantee to tracts of land bordering on the South Canadian River, but on directly opposite banks (R. 77-80). All the land between the two tracts was within the bed of the river. The decision of the court of appeals holds that the Choctaw-Chickasaw Nations retained title to the river bed. In the case of *Hardin* v. *Jordon*, 140 U.S. 371, this Court held that such grants did not reserve title to the river bed, even when the grantor was the United States. This Court pointed out that to hold otherwise would render titles uncertain and derogate from the value of natural boundaries, such as streams and bodies of water. The *Hardin* case, *supra*, follows the common law principles that a grantor will be presumed not to have reserved a strip of land covered by water, which would be of little practical value to him, and that it is a wise public policy to prevent vexatious litigation likely to arise from retention of title to the river bed in the grantor, on the happening of some unexpected event.

2. The decision below conflicts in principle with the decision of the Eighth Circuit Court of Appeals in *United States* v. *Hayes*, 20 F.2d 873, certiorari denied 275 U.S. 552 and 555, which involved title to land within the bed of a river in that part of Oklahoma formerly occupied by the Creek Nation.

3. The decision below conflicts with the settled law of real property established by the Supreme Court of the State of Oklahoma. The Supreme Court of Oklahoma in the case of *State* v. *Warden*, 200 Okla. 613, 198 P.2d 402, held that tribal grants to land bordering on a non-navigable river passed title to the center of the river.

4. The interpretation of the Act of Congress of June 27, 1898, 30 Stat. 493, by the court of appeals directly conflicts with the plain wording of the statute; it conflicts with the interpretation placed thereon by the Secretary of Interior of the United States and the Commissioner to the Five Civilized Tribes, which were the administrative agencies charged with the administration of the Act; it conflicts with the interpretation placed on the Act by the Choctaw-Chickasaw Nations; and it conflicts with the interpretation of the Act by the district court.

The court of appeals held that the Missouri-Kansas & Texas Railroad obtained no title—no right-of-way—not even an easement to the land condemned by the railroad. The Act clearly shows that the purpose of the Act was to "make possible the continued and uninterrupted use of said railroad and said railroad bridge". The Choctaw-Chickasaw Nations in the deed to part of the land involved, which deed was approved by the Secretary of Interior of the United States, treated the land condemned by the railroad as a right-of-way (R. 77). The Commissioner to the Five Civilized Tribes held that the land had been condemned

for railroad purposes (R. 81). The Choctaw-Chickasaw Nations in a lease for oil and gas purposes specifically made the lease subject to the railway easement (R. 85).

The language in Section 4 of the Act was a limitation on the rights in the river and not a limitation on the rights in the land condemned. We believe the Act was intended to limit the rights of the railroad to appropriate the water of the river, to control fishing, boating, bathing, or to further divert the river or place a dam upon the river. Such limitations are consistent with the purpose of the Act.

5. The Missouri-Kansas & Texas Railroad, by condemnation proceedings, acquired the real property set forth in the Act of June 27, 1898, 30 Stat. 493. Such land was acquired for railroad purposes. The Choctaw-Chickasaw Nations, the Secretary of the Interior and the Commissioner to the Five Civilized Tribes treated the land so acquired as a right-of-way and easement. The decision of the court of appeals, in failing to apply Section 14 of the Act of April 26, 1906, 34 Stat. 137, has clouded the titles to all real property abutting on property acquired for railroad purposes where the same has been abandoned by the railroad company. There are many such tracts in that part of Oklahoma which was formerly Indian Territory.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER J. ARNOTE

JAMES B. BRATTON
Counsel for Petitioner

APPENDIX A

1. Act of June 27, 1898, 30 Stat. 493

Whereas the Missouri, Kansas and Texas Railway Company, heretofore, under and pursuant to authority conferred upon it by an act of Congress of the United States, built and constructed its line of railroad through the Indian Territory and through the Creek and Choctaw nations, and pursuant to said Congressional authority, as a part of its said line of railroad, many years since, at great expense, built and constructed a railroad bridge across the South Canadian River; and

Whereas the said South Canadian River, at the point it is crossed by said railroad bridge, and for a long distance on both sides, forms the established boundary line between the said Creek and Choctaw nations; and

Whereas recently unprecedented floods occurred in the South Canadian Valley, resulting in that river overflowing its banks at many points and flooding the contiguous territory and also resulting in the diversion of that river from its old channel at the point it was so bridged by the Missouri, Kansas and Texas Railway Company and for some distance above and below, and the formation of a new course some distance to the north of said bridge, washing away the railroad and railroad bed for a distance of about two miles, seriously interrupting and impeding the transportation of the mails, troops, munitions of war, and interstate commerce generally; and

Whereas it is important that the course of said river be restored to the old channel at and below the bridge of said Missouri, Kansas and Texas Railway Company, and

so established immediately above said bridge as to prevent as far as practicable any further shiftings of the channel of the river and breaking of the railway embankments and overflows of adjoining farm lands, and make possible the continued and uninterrupted use of said railroad and said railroad bridge. Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said Missouri, Kansas and Texas Railway Company be, and it is hereby, authorized, at its sole expense, to restore the said river to its original channel under and below said railroad bridge, and to that end to straighten and shorten the river above said bridge by excavating and constructing a channel for the river, commencing at said bridge and extending thence across sections twenty-eight and twenty-nine of township nine north, range fifteen east, to the South Canadian River, at or near the northwest corner of said section twenty-nine, and for that purpose the said railway company is authorized to enter upon lands adjacent to said railroad.

Sec. 2. That before said channel shall be excavated and constructed through any lands held by individual occupants according to the laws, customs, and usages of the Creek and Choctaw nations, full compensation shall be made to such occupants for all property to be taken or damaged by reason of the construction of said channel. In case of failure to make amicable settlements with any occupant, the railway company may file its petition in the United States court in the Indian Territory for the district in which the lands lie, reciting its failure to make such amicable settlement, and thereupon said court shall appoint a commission of three disinterested persons, having the qualifications of jurors in said court, to view the premises and appraise the damages to be sustained by such

occupant, who, before entering upon their duties, shall take and subscribe before said courts or the clerk thereof an oath that they will faithfully and impartially discharge the duties imposed by their appointment, which oath, duly certified, shall be returned with their award. The award of a majority of said commissioners shall be the award of the commission, and such award shall be filed within ten days after the appointment of said commission. Either party being dissatisfied with the award may file exceptions in said court thereto within ten days from the filing of the same, and a trial of the issues raised by such exceptions shall be had in said court as in other cases. If neither party files exceptions the railway company shall pay into court, before entering upon the land condemned, the amount of said award, together with all costs, assessed as in ordinary cases in said court: Provided, That said commissioners shall be allowed and paid four dollars per day, with mileage at five cents per mile. If either party files exceptions, then the railway company shall pay into court double the amount of the award to abide the judgment thereof, and may at once proceed with the construction of said channel.

Sec. 3. That the boundary line between the Creek and Choctaw nations shall be and remain unchanged by reason of the work hereinbefore authorized to be done by said railway company.

Sec. 4. That the Missouri, Kansas and Texas Railway Company by such condemnation proceedings and the construction of said channel, and the diversion of the river through same, shall have no other or further rights in and to said river than it now has.

Approved, June 27, 1898.

2. Sections 14 and 26 (b), Act of July 1, 1902, 32 Stat. 641

§14. When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

§26. The following lands shall be reserved from the allotment of lands herein provided for:

(a) * * *

(b) All lands to which, at the date of the final ratification of this agreement, any railroad company may under any treaty or Act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses connected with the maintenance and operation of the railroad.

3. Section 14, Act of April 26, 1906, 34 Stat. 137

That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations reserved from allotments or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation or organization entitled thereto: Provided, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof:

Provided further, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7512—MAY TERM, 1964

ROGER BAUMAN, Trustee for the Jon Roger Bauman Trust Estate and the Michael Collins Bauman Trust Estate,

Appellant,

vs.

CHOCTAW-CHICKASAW NATIONS; HEIRS OF W. E. ROWSEY; and UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma

---

Walter J. Arnote and James B. Bratton (Arnote, Bratton & Allford, of counsel, were with them on the brief) for Appellant.

W. F. Semple (James G. Welch was with him on the brief) for Appellees.

Before PICKETT, LEWIS, and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This appeal grows out of a condemnation action brought by the United States to acquire land for the Eufala Dam and Reservoir Project in Oklahoma. The issues have been reduced to whether appellant Bauman, as trustee, or appellee Choctaw-Chickasaw Nations own Tract L-1240. We are concerned with lands in Sections 20 and 29 which the Canadian River,[1] a non-navigable stream, has crossed in various meandering channels during the last 60-70 years.

The government brought action No. 4737 to condemn Tract L-1229 which includes all the South Half, and a narrow strip of the North Half of Section 29, and some land in other sections. Bauman, the successor in title of allottees of the Nations, appeared and claimed all the land in Section 29 and all land in Section 20 south of the thread of the river. The government then brought action No. 5229 to condemn all that portion of Section 29 lying north of Tract L-1229. This area is known as Tract L-1240 and contains about 256 acres. Named as claimants were Bauman, the Nations, the heirs of one Rowsey, and other persons. During the trial proceedings, stipulations and agreements disposed of all issues except the conflicting claims of Bauman and the Nations to Tract L-1240. The trial court held for the Nations and made an appropriate order under Rule 54(b), F.R.Civ.P., to permit this appeal.

Prior to 1898 the river took a northerly course through Sections 30, 19, and 20. It then looped through Sections 16 and 15 and turned southerly over Sections 22, 21, and 28. A flood in 1898 created a new channel in Section 22 and caused the river to flow southerly across that section and Section 27.

---

1. In some of the testimony and exhibits the stream is referred to as the South Canadian River.

The M. K. & T. railroad runs in a northeasterly-southwesterly direction across Sections 22, 27, and 28. The 1898 flood severely damaged the railroad tracks and bed.

In 1898 the United States held these lands as guardian of the Indians. Congress acted to help the railroad by the passage of the Act of June 27, 1898,[2] entitled "An Act To authorize the Missouri, Kansas and Texas Railway Company to straighten and restore the channel of the South Canadian River, in the Indian Territory, at the crossing of said railroad." The Act recited the construction of the railroad under congressional authority and the occurrence of unprecedented floods "resulting in that river overflowing its banks * * * and * * * in the diversion of that river from its old channel, * * * and the formation of a new course some distance to the north of said bridge, washing away the railroad and railroad bed." The Act further said that "it is important that the course of said river be restored to the old channel." The railroad was authorized "to restore the said river to its original channel," "to straighten and shorten the river above said bridge by excavating and constructing a channel" and "for that purpose * * * to enter upon lands adjacent to said railroad." The railroad was required to make full compensation for property taken or damaged and, in the event of the impossibility of amicable settlement, had the power to condemn. Section 4 of the Act reads:

> "That the Missouri, Kansas and Texas Railway Company by such condemnation proceedings and the construction of said channel, and the diversion of the river through same, shall have no other or further rights in and to said river than it now has."

The record is not clear as to what the railroad did pursuant to the 1898 Act. Apparently it condemned a 292.9

---

2. 30 Stat. 493.

acre tract beginning with the river channel in Sections 19 and 30, crossing the southwest corner of Section 20 and the North Half of Section 29, and ending with the river channel in Section 28. The record contains no description of the tract condemned.

From 1898 to the present the river has followed various courses through Sections 29 and 20. A railroad map shows different banks and channels in the years 1898, 1900, 1901, 1903, 1906, 1914, 1919, 1920, 1923, and 1924. Other maps show the existing channel which loops through Section 20. In Section 29 the channels are in the North Half and the Northeast Quarter of the Southeast Quarter.

As to land in the North Half of Section 29, Bauman holds under a 1914 Unallotted Land Deed from the Nations to one Rowe covering 20.48 acres in the Northeast Quarter and a similar 1917 deed to one Martin covering 45.89 acres in the Northwest Quarter. In each deed the description is by metes and bounds and no reference is made either to the river or to the tract condemned by the railroad.[3] Counsel for Bauman insist that the northerly line of each of these tracts is along either the southerly bank of the river or the southerly line of the railroad tract.

In Choctaw and Chickasaw Nations v. Seay, 10 Cir., 235 F.2d 30, 35, certiorari denied 352 U.S. 917, a case relating to the Red River, this court said,

---

3. With reference to the tract deeded to Rowe, the Commissioner for the Five Civilized Tribes wrote in 1914 that the Department had approved the sale "less said condemned area and the area washed away by the river." The area deeded to Martin was part of Tract No. 1481. With reference to this tract the Commissioner wrote one Rorer in 1914 that: "Inasmuch as 88.27 acres of this tract had been condemned by said railroad, this office was without authority to dispose of same either by allotment or sale."

> "Under the common law, a grant of land bounded on a non-navigable river by a grantor who owns to the center or thread of the stream conveys to the grantee the land to the center or thread of the stream, unless the terms of the grant and the attendant circumstances clearly denote an intention to stop at the edge or margin of the river."

Relying on this principle Bauman argues that under the Rowe and Martin deeds the grants went to the thread of the stream.[4] Many difficulties beset this claim. The parties stipulated that the northerly line of the Martin tract is based on the meander lines of the river except the last call which follows the line of the railroad tract. They also stipulated that the northerly line of the Rowe tract follows the south line of the railroad tract. Thus, the northerly line of Martin follows the river for part of its distance and otherwise the northerly lines of both Martin and Rowe follow the south line of the railroad tract. The record shows that the southerly bank of the stream across Section 29 and the southerly line of the railroad tract are not the same.

We believe that the rule stated in Seay has no application here. Over the years the Canadian River has repeatedly changed its channel and banks. The maps disclose that this instability has covered an area approximately one mile in breadth from the middle of Section 29 north to the middle of Section 20. Manifest injustice would result if the Seay decision were applied to extend Martin's and Rowe's northerly lines a distance of about one-half mile to the north. This is not a case of gores and strips.[5]

---

4. The argument is unclear as to how this position would help Bauman as to land in Tract L-1240 northerly of the thread of the stream.

5. See United States v. Magnolia Petroleum Co., 10 Cir., 110 F.2d 212, 217-218.

Through ownership of the 20-acre Rowe tract and the 45-acre Martin tract, Bauman claims Tract L-1240 containing 256 acres. The Seay decision recognizes that "attendant circumstances" may preclude the operation of the rule. In the circumstances of this case the fair construction of the Rowe and Martin deeds is to confine them to the lands covered by their metes and bounds descriptions.

Bauman's next reliance is on adverse possession. His theory appears to be that as the river channel changed to the north the holders of the Rowe and Martin tracts extended their possession to the southerly river bank. The trial court held to the contrary, finding that there was no adverse possession of any part of Tract L-1240 for the statutory period of 15 years.[6] Substantial evidence sustains this finding and we must accept it.

Bauman also relies on the Act of April 26, 1906,[7] which provides for the disposition of the lands of the Five Civilized Tribes. Section 14 of that Act says that upon the abandonment of any right of a railroad "in the nature of an easement for right of way, * * * or other uses connected with the maintenance and operation of such company's railroad, * * * title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part," with an exception which is not pertinent. We have construed and applied these provisions of Section 14 in a number of cases[8] but none of them are pertinent to the problem now before us.

The rights which the railroad acquired in Section 29 are based on the previously mentioned 1898 Act. That Act

---

6. 60 O.S. 1961, § 333 and 12 O.S. 1961, § 93.

7. 34 Stat. 137.

8. See City of Wilburton v. Swafford, 10 Cir., 253 F.2d 479, and cases cited on p. 482.

conveyed to the railroad no title or semblance of title. At the time the United States, as guardian of the Indians, owned all the pertinent land. By the 1898 Act the United States gave the railroad the right to change the channel of the river. Section 4, which we have heretofore quoted, says that the railroad "shall have no other or further rights in and to said river than it now has." The record discloses no basis for any railroad right in Section 29 other than that given by the 1898 Act. In our opinion that Act gave no easement to the railroad and, hence, Section 14 of the 1906 Act has no application.

The claim of accretion is without merit. "Accretion" denotes the process by which the area of owned land is increased by the gradual deposit of soil due to the action of a bounding river or other body of water.[9] Accretion occurs when the change in the river is gradual and imperceptible.[10] The gradualness of the process distinguishes accretion from the more rapid, easily perceived, and sometimes violent, shifts of land incident to floods, storms or channel breakthroughs known as "avulsion."[11] A sudden change in the channel of a river, as occurs in the case of avulsion, does not affect title to the lands thus transferred from one side of the river to the other.[12]

In the case at bar the river changed channels many times. Nothing in the record shows that these changes were gradual and imperceptible. The trial court specifically found that the change to the railroad tract was by avulsion.

---

9. Powell on Real Property, vol. 6, ¶ 983, pp. 581-583. See 60 O.S. 1961, § 335.

10. Goins v. Merryman, 183 Okl. 155, 80 P.2d 268, 270; Powell, supra, ¶ 984, p. 585.

11. See Powell, supra, ¶ 983, p. 581, note.

12. Buchheit v. Glasco, Okla., 361 P.2d 838, 841; Stockley v. Cissna, 6 Cir., 119 Fed. 812, 822; American Law of Property, vol. III, § 15.29, pp. 861-862.

The finding is not shown to be clearly erroneous and must stand. Under the rules which we have stated this change did not affect ownership of the land previously south of the river but after the change north of the river. When the river returned to the northern channel, the titles to the land in the area intervening between the two channels were not disturbed. We agree with the trial court that Bauman has no claim to any part of Tract L-1240 because of accretion. In our opinion that tract is unallotted tribal land and is owned by the Nations.

One matter remains for consideration. The trial court held that the Nations owned all of Tract L-1240 except 20 acres described as the North Half of the Northeast Quarter of the Northeast Quarter of Section 29, and adjudged that this 20-acre tract was owned by the heirs of one Rowsey. The Nations do not object to this portion of the judgment but Bauman does and points out that by stipulation it was agreed that he now owns this tract. The record sustains Bauman and the judgment must be corrected to show that he owns the mentioned 20 acres.

Modified and affirmed.